SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2024 0235

AIDAN THOMSON Applicant

v

THE KING Respondent

JUDGES:	LYONS and T FORREST JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	7 May 2025
DATE OF JUDGMENT:	23 May 2025
MEDIUM NEUTRAL CITATION:	[2025] VSCA 111
JUDGMENT APPEALED FROM:	[2024] VCC 1813 (Judge Mullaly)

CRIMINAL LAW – Appeal – Sentence – Multiple charges of aggravated burglary, theft of motor vehicles and related dishonesty offences – 17 prior aggravated burglaries – Total effective sentence of 4 years and 4 months' imprisonment – Non-parole period of 2 years – Whether *Director of Public Prosecutions v Ristic* [2024] VSCA 251 correctly applied – Whether sentence manifestly excessive – No error of law in judge's decision – Judge appropriately considered unique circumstances – Applicant's numerous failed attempts to rehabilitate – Very serious offending – Re-traumatised same victims – Sentence well within range – Proposed grounds have no merit – Leave to appeal refused.

Director of Public Prosecutions v Ristic [2024] VSCA 251, discussed.

Clarkson v The Queen (2011) 32 VR 361; *Karam v The King* [2024] VSCA 164; *Lai v The King* [2023] VSCA 151, considered.

Counsel

Applicant:	Mr R Bhattacharya
Respondent:	Mr R Gibson KC

Solicitors

Applicant:	Greg Thomas Barrister & Solicitor
Respondent:	Ms A Hogan, Solicitor for the Office of Public Prosecutions

LYONS JA
T FORREST JA:

1 On 13 November 2024, the applicant pleaded guilty to sixteen indictable and one summary offence. Following a plea in mitigation, the applicant was sentenced on that day as follows:

Charge on Indictment	Offence	Max Penalty	Sentence	Cumulation
1	Theft of motor vehicle[1]	10 years	12 months	1 month
2	Theft of motor vehicle	10 years	12 months	1 month
3	Aggravated burglary[2]	25 years	28 months	Base
4	Theft of motor vehicle	10 years	12 months	1 month
5	Burglary[3]	10 years	24 months	12 months
6	Theft[4]	10 years	3 months	N/A
7	Theft	10 years	1 month	N/A
8	Obtain financial advantage by deception[5]	10 years	1 month	N/A
9	Theft of motor vehicle	10 years	9 months	1 month
10	Theft of motor vehicle	10 years	18 months	6 months
11	Theft of motor vehicle	10 years	12 months	1 month
12	Theft of motor vehicle	10 years	12 months	1 month
13	Handling stolen goods[6]	15 years	1	N/A

1 Contrary to s 74(1) of the *Crimes Act 1958*.
2 Contrary to s 77 of the *Crimes Act 1958*.
3 Contrary to s 76 of the *Crimes Act 1958*.
4 Contrary to s 74(1) of the *Crimes Act 1958*.
5 Contrary to s 82(1) of the *Crimes Act 1958*.
6 Contrary to s 88 of the *Crimes Act 1958*.

			month	
14	Possess drug of dependence[7]	30 penalty units and/or 1 year imprisonment	$10 0 fine	Aggre gate fine
15	Possess drug of dependence	30 penalty units and/or 1 year imprisonment	$10 0 fine	Aggre gate fine
16	Possess drug of dependence	30 penalty units and/or 1 year imprisonment	$10 0 fine	Aggre gate fine
Related Summary Offences				
8	Trespass[8]	25 penalty units or 6 months	1 month	N/A
Total effective sentence:		4 years and 4 months' imprisonment		
Non-parole period:		2 years' imprisonment		
Pre-sentence detention declared:		498 days		
Section 6AAA Statement:		6 years' imprisonment with a non-parole period of 4 years		
Other Relevant Orders: 1. Charges 1, 2, 4, 9, 10, 11, 12 – Driver Licence cancelled and disqualified for 24 months from 13 November 2024. 2. Charge 8 – Restitution Order for $72.50 payable to Judith Crowl. 3. Charges 14, 15, 16 – Forfeiture Order relating to the drugs of dependence listed in the Schedule.				

2 The applicant seeks leave to appeal against his sentence on the following two proposed grounds:

> Ground 1:
>
> The learned judge made an error in law while sentencing on Charge 3 by incorrectly ruling that the intention of the decision in *DPP v Ristic* [2024],[9] was that a residential aggravated burglary usually warranted at least three years of imprisonment.

7 Contrary to s 73(1) of the *Drugs, Poisons and Controlled Substances Act 1981*.

8 Contrary to s 9(1)(e) of the *Summary Offences Act 1966*.

9 *Director of Public Prosecutions v Ristic* [2024] VSCA 251 ('*Ristic*').

Ground 2:

In all the circumstances and when regard is had to

– The objective seriousness of the offending on Charges 3, 5 and 10

The total effective sentence as well as the non-parole period and orders for cumulation imposed for Charges 3, 5 and 10 are manifestly excessive. For the reasons that follow, we would dismiss the application for leave to appeal.

The offending[10]

3 The applicant was convicted of a spate of offending which took place between 9 April 2023 and 4 May 2023. All except one of the 17 offences were committed in a five-day period between 1 May 2023 and 4 May 2023. The offences were committed with a co-offender. The applicant was 21 years old at the time of the offending. In short compass:

(a) on 9 April 2023, a 2022 white Hyundai Ioniq was stolen following a burglary in Newtown (charge 1 — theft of a motor vehicle). On 17 April 2023, Victoria Police recovered this vehicle at the applicant's residence;

(b) between the evening of 1 May 2023 and morning of 2 May 2023, a 2016 Mazda CX-3 was stolen from Corio (charge 2 — theft of a motor vehicle). Victoria Police subsequently recovered this vehicle at the applicant's residence;

(c) on the evening of 1 May 2023, a silver Mercedes-Benz station wagon CLA200 and a silver Mercedes-Benz X250 ute were stolen from a residence in Armstrong Creek. At the time of offending, all occupants of the home, the two victims and their two children, were present and asleep. Text messages and photographs exchanged between the applicant and co-offender made it clear that the applicant and co-offender entered the home, stole the victim's handbag containing the keys to the two cars and then stole both cars (charge 3 — aggravated burglary; charge 4 — theft of a motor vehicle);

(d) at midday on 2 May 2023, Ms Thornton, her mother and her two children drove into the driveway of her mother's home in Pepperdine Way, Highton. Ms Thornton saw a silver Mercedes-Benz station wagon in the driveway. She also observed three males exit the house and get into the Mercedes with one passenger holding a red Nike box from her mother's wardrobe (charge 5 — burglary). The Mercedes then rammed Ms Thornton's vehicle three times and sped off over the nature strip. On inspection of the home, the belongings of her mother and her mother's husband in many rooms were strewn around. The house had been ransacked. Later that day, her mother's credit card was used without her authorisation at a convenience store (charge 7 — theft; charge 8 — obtain financial advantage by deception);

10 This description of the circumstances is drawn from the *Summary of prosecution opening* which was an agreed statement of facts.

(e) on 2 May 2023, the applicant stole a 2011 VE Holden Commodore ute from a home at Konrads Crescent, Highton (charge 9 — theft of a motor vehicle);

(f) on 3 May 2023, the applicant returned to the property at Pepperdine Way, Highton and used the keys stolen the previous day to steal an Audi Q3 belonging to the husband of Ms Thornton's mother, Mr Crowl (charge 6 — theft; charge 10 — theft of a motor vehicle). Mr Crowl ran to his car and tried to pull the driver from the car, however, the vehicle sped up, and Mr Crowl tumbled onto the grass, fortunately escaping injury. The vehicle was later recovered from the applicant's residence;

(g) on the evening of 3 May 2023, the applicant stole a black Mazda CX-5 wagon and a white Mazda CX-9 wagon from a property in Torquay while the victim, her partner and two children were asleep (charges 11 and 12 — theft of a motor vehicle). The vehicle was later recovered from the applicant's residence;

(h) on 4 May 2023, a green hedge trimmer was found to be stolen from another property in Torquay and later recovered from the applicant's residence (charge 13 — handling stolen goods);

(i) on the evening of 3 May 2023, the applicant and co-offender trespassed the backyard of a home of a couple in Newtown before being startled by the alarm system and family dog (summary offence — trespass); and

(j) on 4 May 2023, the applicant was arrested and had methylamphetamine, Xanax and MDMA in his possession (charges 14–16 — possess drug of dependence).

Procedural background

4 A plea hearing was held on 13 November 2024 before Judge Mullaly at the County Court.[11] The applicant admitted his prior criminal history and pleaded guilty to all charges. Subsequently, the applicant was sentenced on 13 November 2024.

Application for extension of time

5 On 20 December 2024, the applicant made an application for an extension of time to file a notice of application for leave to appeal, attaching an affidavit of his solicitor describing the circumstances. The applicant was nine days late in filing his application for leave. At the hearing of this application, we indicated to the parties that if we considered the application for leave to appeal had merit, we would grant the extension of time application.

Reasons for sentence

Gravity of the offending

6 The judge gave detailed and thorough reasons for the sentence imposed. He

11 The applicant initially pleaded guilty in March 2024. The plea to aggravated burglary was withdrawn in April 2024 and was revived on 22 August 2024. The plea hearing was then listed.

commenced by summarising the circumstances of the charges.[12] The judge then emphasised the seriousness of the offending and the importance of being seen to properly respond to the community's intolerance of home invasions, aggravated burglaries, and thefts of valuable property.[13] The judge said:

> As I have already noted, these crimes amount to serious offending. Our community has no tolerance for thefts of valuable property such as cars, just for the pleasure and convenience of offenders, to enable them to get around, mostly to commit other crimes. As stated, breaking into family homes leaves a mark on victims and it also diminishes the whole community's sense of safety. Young offenders, especially recidivist young offenders such as you are, cannot expect that these sorts of crimes will be explained away, as it were, because you have become drug addicted.
>
> While your personal circumstances are important, especially your young age, and I will turn to all matters personal to you shortly.
>
> What remains of primary importance is that the courts are seen to properly respond to the community's intolerance of home invasions and thefts of their valuable property. As I said, the Court of Appeal in *Ristic*[14] just last month spoke of the seriousness of aggravated burglaries where the intent was to steal; that is going into a family home while the family slept and stealing their items, in that case unknown to them.
>
> What the Court of Appeal indicated there was that sentences of at least three years for such crimes are usually warranted, though each case has unique circumstances.[15]

7 The above emphasised passage is relevant to proposed ground 1.

Prior criminal history

8 The judge then turned to the personal circumstances of the applicant in some detail.[16] The judge noted the following summary of the applicant's history with the courts:

(a) the applicant had accumulated 'a very long and concerning criminal history', the number and seriousness of the crimes increasing and including aggravated burglary and multiple car thefts beginning at the age of 16;[17]

(b) from 2018 to 2021, the applicant was sentenced to various community corrections or rehabilitative orders for a variety of aggravated burglary, violence, theft of cars and other dishonesty offences, and these orders were breached;[18]

12 *DPP v Thomson* [2024] VCC 1813, [1]–[22] ('Reasons').
13 Ibid [23]–[26].
14 *Ristic* (2024) VSCA 251 (Beach, Kennedy and Boyce JJA).
15 Ibid [54] (Beach, Kennedy and Boyce JJA) (emphasis added).
16 Reasons, [27]–[55].
17 Ibid [27]–[28].
18 Ibid [29]–[34].

(c) the applicant was subject to a community corrections order for a separate offence of multiple car thefts and aggravated burglary when these further crimes were committed;[19] and

(d) the applicant has been before the courts on 11 separate occasions, and in each instance the sentence imposed sought to help the applicant to rehabilitate and stay out of custody. The failure to take up these opportunities lowered the court's confidence in the applicant's capacity for reform.[20]

9 In this context the judge concluded:

> Your counsel, in his carefully prepared and comprehensive plea, acknowledged as much, that there is a need for deterrence to you and protection of the community. Also your prior history reveals a bewildering number of aggravated burglaries and car thefts. There are just over 19 aggravated burglaries or attempted aggravated burglaries and a similar number, if not more, for the car thefts. Your propensity to break into houses when people are at home, and your propensity to steal valuable cars means deterrence to you and protection of the community from you become very weighty matters.[21]

Personal circumstances

10 In relation to the applicant's background, the judge referred to the reports of two different medicolegal psychologists, Ms Kennedy in November 2022 and Ms Bovenkerk in November 2023.[22] The judge noted the following:

(a) the applicant had a difficult childhood and at age 14–15, the applicant moved to his mother's household against his father's wishes which set in train a cycle of drug use or increased drug use, and offending with other drug users;[23]

(b) the applicant was diagnosed as having attention deficit hyperactive disorder ('ADHD') as a child and medicated, however this does not have any ongoing implications on the applicant's personality or behaviour;[24]

(c) the applicant attended school to year 10 and has engaged in further education in a youth justice centre when on youth parole but has never had employment;[25]

(d) the applicant formed a relationship and is the father of a child born in 2021. The judge noted that the birth of the child had a stabilising impact on the applicant.[26] The judge accepted that the applicant is motivated to resume a relationship with his child and to properly parent his child and this was

19 Ibid [33]–[34].
20 Ibid [35], [37].
21 Ibid [36].
22 Ibid [38].
23 Ibid [40]–[41], [49].
24 Ibid [42], [49].
25 Ibid [43].
26 Ibid [44], [47].

weighed in favour of a rehabilitative sentence;[27]

(e) the applicant has not participated in any sustained drug rehabilitation, and methylamphetamines are a particular challenge for the applicant;[28]

(f) the applicant has recently had significant involvement with the local Wathaurong workers to engage with his indigenous heritage, and considered positive letters of Ms Matheson of the support provided to the applicant in custody, of Mr Thompson of the family violence, mental health and drug referrals that were made, and of Mr Drummond, the Wathaurong's drug counsellor, who expressed some confidence in the applicant's rehabilitation;[29] and

(g) the applicant has completed an 'impressive' number of certificates verifying the vocational and rehabilitative programs the applicant has undertaken while on remand.[30]

Denunciation, deterrence and protection of the community

11 Finally, the judge outlined the key sentencing considerations in this matter.[31] In particular, the judge set out the principles governing sentencing young offenders in order to endeavour to facilitate rehabilitation — noting that this is contrasted with the seriousness of the offending and the fact that the applicant has been given several chances on rehabilitative corrections orders which have been breached.[32]

12 After setting out the judgment of Redlich JA in *Azzopardi*,[33] the judge concluded that:

> … [W]hile youth and rehabilitation are important, there are circumstances where they must be subjugated to other considerations or take a back seat to them. The importance is to find the balance.
>
> Your case is one where the seriousness of the offending is such that your rehabilitation, because of your youth, must yield to the other sentencing purposes of denunciation, deterrence generally and specific to you, and protection of the community.
>
> … you do express your regret and recognise your stupidity in being involved in these offences.
>
> …
>
> Given the seriousness and the repetitive offending involved here, in my view another community corrections order in addition to the time on remand cannot adequately express the need for deterrence to you and others, it cannot

27 Ibid [48].
28 Ibid [45].
29 Ibid [50]–[54].
30 Ibid [55].
31 Ibid [56], [61]–[69].
32 Ibid [56]–[60].
33 *Azzopardi v The Queen* (2011) 35 VR 43; [2011] VSCA 372.

> adequately express the need for protection of the community from you, given your past, and in particular, your recent failures on the community corrections order. And a combined sentence cannot adequately punish you for what you did to the many victims. Also, the effect of your crimes on the community generally warrants punishment.[34]

Youth and rehabilitation

13 In imposing his sentence for each offence and in determining a total cumulative sentence, the judge acknowledged that it was a grave step to impose on a young person a sentence involving years of imprisonment and he only did so after 'anxious consideration and exploring every alternative option'.[35] Acknowledging the applicant's efforts in recent times in prison, in particular with the involvement of the indigenous support workers, the judge fixed a lower than usual non-parole period. The non-parole period of 2 years is 46 per cent of the total effective sentence; the corollary of this, as observed by the judge, is a longer than usual period of potential parole to assist in the applicant's efforts towards rehabilitation.

Proposed ground 1

Applicant's submissions

14 The applicant submitted that the judge erred in his characterisation of the statement of principle in *Ristic*. We refer to the emphasised passage in paragraph [6] of these reasons. For convenience, we shall repeat it:

> [T]he Court of Appeal in *Ristic* just last month spoke of the seriousness of aggravated burglaries where the intent was to steal; that is going into a family home while the family slept and stealing their items, in that case unknown to them.
>
> What the Court of Appeal indicated there was that sentences of at least three years for such crimes are usually warranted, though each case has unique circumstances.[36]

15 The applicant submitted that this was an incorrect summary of *Ristic* because the case is not authority for the principal that <u>all</u> aggravated burglaries involving theft in the family home are so serious that at least 3 years of imprisonment are usually warranted.

16 The relevant passages of *Ristic* are as follows:

> Each of the six aggravated burglaries committed by the respondent was a serious example of that crime, involving, as they did, breaking into residential premises in the early hours of the morning, at times when the residents would likely be home. They also involved the use of a balaclava and gloves on each occasion; and, on two occasions, the respondent was in possession of a large kitchen knife. It was of course a significant aggravating

34 Reasons, [60]–[62], [65].
35 Ibid [66].
36 Ibid [25]–[26] (citations omitted).

> feature that the respondent was on a community correction order when he committed each offence.
>
> When one has regard to the maximum penalty for aggravated burglary (25 years) and all of the matters to which we have referred, it is difficult to see how, in all the circumstances, sentences of less than three years could have been imposed on any (much less each) of the aggravated burglaries. Similarly, it is very difficult to see how orders for cumulation of only two months could have been imposed on any of these charges. Sentences of imprisonment ranging from 1 year and 8 months (charge 2) to 2 years and 2 months (charge 8) were each wholly outside the permissible range of sentencing options available to the judge, as were the extremely modest orders for cumulation of 2 months on each of the aggravated burglary charges other than the base sentence (charge 8).[37]

17 The applicant submitted that the court in *Ristic* did not state that imposing a sentence of at least 3 years will 'usually' be warranted in aggravated burglaries where the intent was to steal: rather *Ristic* only goes so far as to hold that the 3-year sentence was imposed because it was 'a serious example of that crime'.[38]

18 The applicant submitted that the following considerations are relevant to the assessment of gravity, relying on *Director of Public Prosecutions v Meyers*:[39]

(a) the offender's intent at the point of entry (whether to steal or commit assault or cause damage);

(b) the mode of entry (eg by forcing a door or breaking a window);

(c) whether the offender was carrying a weapon;

(d) whether the offender was alone or in company;

(e) the time of day at which the burglary took place;

(f) what the offender knew or believed about who would be inside and/or about where the person(s) would be; and

(g) whether the offender was someone of whom the victim was particularly frightened.[40]

19 In this regard, the applicant submitted that the following circumstances are relevant:

(a) the intent here was to steal, the least serious of the options;

(b) there is no evidence as to whether entry was forced or open;

(c) there is no evidence that the applicant was carrying a weapon;

37 *Ristic* [2024] VSCA 251, [53]–[54] (Beach, Kennedy and Boyce JJA) (citations omitted) (emphasis added).

38 Ibid [53].

39 [2014] 44 VR 486 (Maxwell P, Redlich and Osborn JJA); [2014] VSCA 314.

40 Ibid [48] (Maxwell P, Redlich and Osborn JJA).

(d) while it is likely that the applicant entered the house in company — as two vehicles were stolen — there is no evidence that two people entered the house;

(e) the burglary took place at night;

(f) the applicant accepts he was at least reckless as to the presence of people in the house; and

(g) there is no evidence that the complainants knew the applicant.

20 The applicant noted that there was no specific discussion in the judge's reasons about where this aggravated burglary fell in the spectrum of aggravated burglaries. He submitted, however, that usually any confrontation during the burglary would elevate the seriousness of this kind of matter, and in this case the complainant had no confrontation or contact with the applicant. Further, the applicant relied on the judge's characterisation of the offending as a 'standard aggravated burglary' at the plea hearing.

21 The applicant reiterated their submissions at the plea hearing that the seriousness of this offence is low because it was a non-confrontational aggravated burglary with an intent to steal such that the applicant's offending falls at the bottom of the scale of seriousness.

22 Finally, the applicant submitted that a significant proportion of aggravated burglaries involving thefts (and where no weapon is present) proceed to sentence in the Magistrates' Court. For instance, there were 740 cases of aggravated burglary that proceeded in the Magistrates' Court in the three years to June 2023 involving an 'intent to steal'. In such cases, there is a maximum period of 2 years' imprisonment for each individual charge in the Magistrates' Court. On this basis, it is submitted that by sentencing on the basis that — even for a 'standard aggravated burglary' — a statement that about 3 years' imprisonment would be usually warranted, was a material error.

23 As a result, the applicant contended that the sentence should be set aside and the applicant resentenced on this charge.[41]

Respondent's submissions

24 The respondent agreed that *Ristic* is not authority for the principle that all 'persons present', 'intention to steal' aggravated burglaries require a 3-year term of imprisonment. However, the respondent submitted that the sentencing judge appropriately stated that 'sentences of at least three years for such crimes are usually warranted' and noted that 'each case has unique circumstances'.[42] The comments referring to *Ristic* were part of the instinctive synthesis of sentencing and were not applied in the blanket approach that the applicant contended.

41 Noting that this was the base sentence, the entire sentencing discretion is enlivened in relation to the total effective sentence.

42 Reasons, [25]–[26].

25 The respondent contended that these offences were serious examples of the crime, and the judge characterised them as such. The respondent referred to the very grave nature of an invasion by an offender into the sanctuary of a victim's home, a place where they are entitled to feel safe, which has been said to engender fear and terror that strikes into the heart of victims.[43]

Consideration — proposed ground 1

26 We have reproduced the relevant passage of *Ristic* at paragraph [16] of these reasons and emphasised the statement applicable to proposed ground 1. We consider that the court in *Ristic* was saying no more than in Ristic's circumstances, having regard to the maximum penalty, it was difficult to see how *he* could have been sentenced to any less than 3 years' imprisonment for any of the aggravated burglaries to which he had pleaded guilty. Ristic's aggravated burglaries were all of the 'intention to steal' variety.[44]

27 We do not understand the sentencing judge in the present case to be applying a legal principle laid down in *Ristic* concerning all 'intent to steal', 'persons present'[45] aggravated burglaries. Rather, we take the judge to be referring to a similar recent example where sentences in this range were imposed upon a resentencing exercise by this Court. If the judge were of the view that *Ristic* set some sort of baseline or tariff, then the judge would have been in error. It is clear to us that the judge did not act on this basis: firstly, his Honour correctly observed that each case has its own unique circumstances;[46] and secondly, the sentence imposed (28 months) on the aggravated burglary charge is considerably less than any purported baseline or tariff.

28 We accept that the judge perhaps could have expressed the impugned passage more clearly; however, it must be said that the disputed line in the judgment is a tiny part of a difficult sentence which is otherwise a model of clarity, balance and transparency.

29 In attractive submissions, counsel for the applicant, Mr Bhattacharya, contended that even if the judge did not apply this statement from *Ristic* as a binding sentencing principle, the fact that he may have misinterpreted what was said by way of obiter in that case was sufficient to skew the instinctive synthesis against the applicant. For reasons that we express under proposed ground 2, we consider that the sentence imposed was, in all the circumstances, quite moderate, and we remain unpersuaded that there was an 'error in law' or, if there were some misinterpretation of the impugned passage in *Ristic*, that it had any material impact on the sentence ultimately imposed on charge 3.

30 The applicant has not demonstrated that this proposed ground of appeal is reasonably arguable.

43 *Comensoli v The Queen* [2020] VSCA 2, [4] (Maxwell P and Whelan JA).

44 *Ristic* (2024) VSCA 251, [48] (Beach, Kennedy and Boyce JJA). The 'intent to steal' element in the offence of 'burglary' is provided in s 76(1)(a) of the *Crimes Act 1958,* and the elements of 'aggravated burglary' are provided in s 77 of that Act.

45 *Crimes Act 1958*, s 76(1)(b). Cf *Crimes Act 1958*, s 76(1)(a).

46 Reasons, [11].

Proposed ground 2 — manifest excess

Applicant's submissions

31 The applicant acknowledged the difficulty in establishing a manifest excess ground, however submitted that the judge gave too much weight to the objective seriousness of charges 3, 5 and 10 which had a material impact and resulted in a sentence outside the range of sentences that are reasonably open.

32 The applicant relied on his submissions above in relation to the seriousness of charge 3, submitting the offending was at the 'lower end of the scale of seriousness for this kind of charge'.

33 Charges 5 and 10 related to the incidents at Pepperdine Way on 2 and 3 May 2023 referred to at [3(d)] and [3(f)] above, namely the burglary and the subsequent theft of a motor vehicle.

34 As to the nature of the applicant's involvement in charge 5 and the gravity of his offending, the applicant relied upon the fact that the burglary took place in daylight hours when the Pepperdine Way premises were unattended and that the prosecution did not allege that the applicant was driving the vehicle that rammed Mrs Thornton's vehicle. The applicant contends that in circumstances where the applicant was not personally responsible for this frightening post-offence conduct, the sentence of 24 months' imprisonment on charge 5 with 12 months' cumulative is manifestly excessive.

35 Insofar as charge 10 is concerned, the applicant relied upon the fact that he was not the driver of this vehicle at the time when the male victim sought to frustrate the theft and the driver sped away, causing the victim to tumble onto the grass. The applicant contends that in circumstances where the applicant was not personally responsible for this altercation, the sentence of 18 months' imprisonment with 12 months' cumulative for the theft of the motor vehicle is manifestly excessive.

Respondent's submissions

36 The respondent relied on *Hogarth v The Queen*[47] in relation to the Court's need to treat aggravated burglary seriously, and contended that the judge correctly stated the importance of this consideration.

37 In relation to charges 5 and 10, the respondent contended that both crimes carry a maximum penalty of 10 years' imprisonment. The specific circumstances of each were described as causing 'utter terror' to the victims.[48] The respondent highlighted the judge's consideration that returning to Pepperdine Way to use the keys stolen the day before was to subject the same victims to further trauma and this was an aggravating circumstance.[49]

47 (2012) 37 VR 658; [2012] VSCA 302.
48 Reasons, [10]–[11].
49 Ibid [15].

38 Additionally, the respondent contended that the judge appropriately noted the extraordinary criminal history of the applicant with respect to aggravated burglaries and stolen motor vehicles, and considered that the emphasis had now moved from rehabilitation to general and specific deterrence, protection of the community and just punishment.[50] Accordingly, the offences were such that considerations of rehabilitation must yield to specific and general deterrence, denunciation and protection of the community, which the applicant's counsel conceded at the plea hearing.

39 In summary, the respondent contended that the individual sentences imposed by the judge on charges 3, 5 and 10, along with the head sentence and non-parole period,[51] was well within the range of sentences available.

Consideration — proposed ground 2

40 As counsel for the applicant conceded, a ground alleging manifest excess in a sentence appeal is a difficult ground to establish. The impugned sentence must appear to be wholly beyond the range of sentences available in the reasonable exercise of the sentencing discretion.[52] In the absence of an identifiable error in the sentencing process, the sentence must bespeak some underlying error.[53]

41 In the present application, the judge reached the conclusion that, despite his still tender years, the applicant's sentencing luck had expired. Appropriately, the judge agonised over the unpalatable proposition of sentencing such a young man to a lengthy term of imprisonment in an adult setting. We have also given this aspect our anxious attention. We have, reluctantly, come to the same conclusion — the sentencing judge had no real option but to impose lengthy sentences for all of the serious offences on the indictment. The applicant, at the age of 21 years, had convictions or findings of guilt for at least 17 prior aggravated burglaries and two attempted aggravated burglaries. The judge correctly observed that the applicant was not to be punished again for past criminality, however the time had come for sentencing emphasis to move from rehabilitation to general and specific deterrence, protection of the community and just punishment.

42 The judge — again correctly in our view — noted that the applicant had been given numerous opportunities to attempt rehabilitation in previous sentencing orders. This is not to say that the judge ignored the applicant's prospects for rehabilitation; it simply had to assume less emphasis than in former court appearances.

43 This ground focussed specifically on charges 3 (aggravated burglary), 5 (burglary) and 10 (theft of motor vehicle). We consider charge 3 to be an unexceptional example of a serious offence. The maximum term for this offence is 25 years. It is an offence that causes disquiet in the community, and at times, panic and extreme anxiety

50 Ibid [35]–[36].

51 Noting that a longer non-parole period was granted as a concession to the applicant's recent rehabilitative efforts: Reasons, [67].

52 *Clarkson v The Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA); [2011] VSCA 157.

53 *Karam v The King* [2024] VSCA 164, [30] (T Forrest JA); *Lai v The King* [2023] VSCA 151, [16] (T Forrest and Osborn JJA).

amongst its victims. On the occasion of his eighteenth sentence for aggravated burglary, the applicant cannot complain about a sentence that is less than 10 per cent of the maximum available sentence.

44 Charges 5 and 10 were burglary and theft of motor vehicle offences respectively, committed in company and with disturbing surrounding circumstances. The victims of charge 5 arrived home to confront the applicant and his two co-offenders carrying off the spoils of their dishonest activity. The applicant and his two accomplices entered their stolen vehicle and it was driven head-on into the victims' vehicle, ramming it three times.[54] The victims, having escaped uninjured from this activity, were then confronted by the state of their house which had been thoroughly ransacked. The sentence of 2 years' imprisonment was richly deserved and well within range, as was the order for 12 months' cumulation.

45 One day later, the applicant returned to the same address, taking with him a car key he had stolen the day before. Not content with ransacking this private home the day before, and armed with the knowledge that a mature woman, a younger woman and two children had been subjected to a terrifying ordeal on that day, the applicant subjected another member of that family to further emotional trauma. He and a co-offender stole Mr Crowl's car using the stolen key. Mr Crowl ran outside and attempted to stop the thieves from stealing his vehicle. The driver drove off, throwing Mr Crowl to the ground. It cannot be determined who was actually driving the car. Luckily, Mr Crowl was uninjured. We agree with the judge who stated:

> Thus, you intended to subject the already traumatised victims to further crimes. As it turned out again, your conduct was frightening.[55]

46 Mr Bhattacharya put all that could reasonably be said on behalf of his client, however the time for leniency has regrettably passed. The impugned sentences are comfortably within the range of sentences reasonably available to his Honour, as are the orders for cumulation. We will refuse leave to appeal out of time as we are not satisfied the application for leave to appeal has merit.

Conclusion

47 The application for an extension of time in which to apply for leave to appeal against sentence is refused.

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[54] While the burglary charge was complete by the time this act of ramming had occurred, it was accepted on the plea and before this court that this conduct was an aggravating surrounding circumstance to the burglary.

[55] Reasons, [15].